No. 14875

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Ben Greenblatt,

Appellant,

vs.

Ernest R. Utley, Trustee in Bankruptcy for Moses A. Fleming, a Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

Wolver & Wolver,
437 South Hill Street,
Los Angeles 13, California,
Attorneys for Appellant.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Foreword.

Basically, the "Statement of Case and Issues" contained in Appellee's Brief, does not refute any of the preliminary contentions of Appellant's Opening Brief, including the "Statement of Pleadings and Fact as to Jurisdiction" (p. 1), "Statement of Case and Issues" (p. 5), "Specifications of Error" (p. 8), and "Statement of Facts" (p. 10).

ARGUMENT.

I.

The Transfer by the Bankrupt of His Possible Equitable Interest in the Promissory Note, Did Not Constitute a Bankruptcy Preference.

As indicated in Appellant's Opening Brief, the Bankrupt made an absolute and outright transfer of his beneficiary interest in the deeds of trust to H. B. Benner (p. 8). While the amount thus transferred, was potentially greater than the obligation to H. B. Benner, no reservation was therein contained, nor arrangements entered into, for the reversion of any possible balance remaining in favor of the beneficiary after the obligation to H. B. Benner had been fully paid. The rights of the bankrupt in said promissory note was therefore not legal, but equitable, and could only be enforced thereafter, as an equitable right.

In the cases cited under Point "I" of the Argument in Appellant's Opening Brief (p. 17), the bankrupt's estate in each instance, had an equitable right to the property, which, basically, was being held for the bankrupt under some form of trust or fiduciary relationship. All such cases held that the transfer of such equitable right for the benefit of the bankrupt, did not constitute a preference, since neither the property transferred, nor the title therein, was in the bankrupt.

It is respectfully submitted that the law therein enunciated, is particularly applicable hereto, since the bankrupt, after the absolute conveyance to H. B. Benner, could not have asserted title to the beneficiary interest conveyed to Mr. Benner, except after successfully prosecuted equitable litigation.

II.

That the Appellant, Factually, Gave Up His Right to Assert a Valid Mechanic's Lien.

A legally sound argument may be predicated upon an established legal premise supported by recognized legal principles, and still the same may not have the same persuasive effect as an argument, also predicated upon legal precedent, but one wherein the factual basis indicates the justice which follows from adherence thereto. It was the intention, and it is respectfully submitted, that the same was concisely and succinctly stated in Appellant's Opening Brief (p. 21), that the second point of the Argument was propounded upon the aforesaid premise. It was therein set forth, and it is still the intention of the scrivner hereof, that said first point of law be urged with the same sincerity as the within point of law. Its legalistic basis was indicated, and the more general scope of the within point of law, was advocated, without diminution to the preceding point of law, since both of the same are predicated upon established legal principles.

Any contention that any statement constituted a waiver of Point "I" of Appellant's Opening Brief is herewith sincerely controverted and traversed.

Appellees contend that since at the time appellant rendered services for which he was entitled, under the laws of the State of California, to assert a mechanic's lien, he was indebted on a collateral matter to the bankrupt, such lien could not be asserted. No law is cited by appellee to support this contention, and after diligent search, no law in California was found that remotely suggested or indicates that a mechanic's lien is waived by reason of an independent collateral account between the parties.

Section 1193(j) (erroneously described in Appellee's Brief as Section 1193(y)) of the Code of Civil Procedure of the State of California, provides that a claimant must assert in his verified claim of lien, "a statement of his demand after deducting all just credits and offsets."

It is respectfully submitted that this refers to credits and offsets that pertain to the statement of the demand upon which the mechanic's lien is predicated. The law of the state of California has always adhered to credits and offsets predicated upon this premise.

The argument of the Appellee is factually without basis. The promissory note given by the appellant to the bankrupt dated May 28, 1952, in the sum of $36,000.00 and bearing no interest, specifically provides that "principal (is) payable on or before June 1, 1953" [Tr. of Rec., Vol. II, p. 34, line 11; Deft. Ex. "D"]. While the appellant could have anticipated payment prior to June, 1953, the bankrupt could not have enforced payment prior to said date. Therefore, on February 19, 1953, the same could not have been asserted by the bankrupt as a credit or offset, since such obligation was not due or payable on said date.

The release clause contained in the deeds of trust were likewise non-enforceable, since no transfer of property was made by the appellant prior to February 19, 1953. The deeds of trust were not recorded until subsequent thereto [Tr. of Rec., Vol. II, p. 96, line 8]. No escrows were closed prior to said date, and therefore no conveyances were made [Tr. of Rec., Vol. II, p. 94, line 21], and the appellant was not responsible for the non-closing of any such escrows [Tr. of Rec., Vol. II, p. 97, line 7].

Had the promissory note or any part thereof been due or payable, and the offset been allowed on said date, in

satisfaction of the subsequent non-assertion of the mechanic's lien, as indicated in Appellant's Opening Brief, the same would not have constituted a preference (p. 21).

As hereinbefore indicated, the law of California, and basically the general principle of law, applicable to mechanic's liens, has afforded the claimant the right to assert his lien, but he is required to give a credit thereon of offsets and credits in diminution of the amount of such lien and attributable to the transaction that gave rise to such lien. Indicative of the circumstances in which offsets and credits have been allowed by the courts of the State of California, are the following cases:

In the case of *Clancy v. Plover* (1895), 107 Cal. 272, payments made by the owner to a subcontractor, together with costs and attorney's fees, were held to be a proper credit and set-off against the claim of mechanic's liens by the general contractor.

In the case of *Stimson v. Dunham* (1905), 146 Cal. 281, claims of laborers and materialmen were held at page 284, to be a sufficient credit and offset against the general contractor, that where the amount thereof exceeded his claim, he was without the right to assert a mechanic's lien.

In the case of *Wyman v. Hooker* (1905), 2 Cal. App. 36, liens of materialmen paid by the owner, together with attorney's fees and expenses connected therewith, were held at page 40, to constitute a proper credit and offset.

In the case of *Combs v. Eberhard* (1932), 120 Cal. App. 25, the amount of a lien for lumber was held at page 28, to be a proper offset and credit against the general contractor.

Likewise indicating that credits and offsets must be germane to the transaction in which the claim of me-

chanic's lien is asserted, are the general authorities of 57 *C. J. S.* 677; *Mechanic's Liens,* Section 154; and 36 *Am. Jur.* 103; *Mechanic's Liens,* Section 150.

The basic logic behind this rule is that the contractor is morally obligated to prevent liens or claims being filed by subcontractors, laborers or materialmen against the owner of the property upon which the work is done and the mechanic's lien may be asserted, and he is therefore legally bound to credit such owner with any lien or the costs of any lien asserted by any such subcontractor, laborer or materialman. The rationale beyond this rule is set forth in the case of *Stone v. Serimian* (1926), 198 Cal. 520, wherein the respondent asserted a mechanic's lien for the construction of a theatre building, and the appellant interposed a counterclaim for labor and materials furnished by him by reason of the failure of the respondent to do so. The counterclaim was disallowed by the court as a credit. In reversing said judgment, the appellate court held at page 523:

> "It was the duty of respondent to protect the appellants' property against any lien preferred by the lumber company. The owners are entitled to set off against their obligation to pay plaintiff so much as the labor he performed and the materials he furnished are reasonably worth the counter-obligation of plaintiff to indemnify them for any amount they have been compelled to pay to relieve their property from liens filed thereon to secure plaintiff's debts, including the attorney's fees and costs in the suits to enforce the liens. (Code Civ. Proc., sec. 1193; Clancy v. Plover, 107 Cal. 272, 275 (40 Pac. 394); Covell v. Washburn, 91 Cal. 560, 563 (27 Pac. 859); see, also, Holden v. Mensinger, 175 Cal. 300, 305 (165 Pac. 950).)"

It is respectfully submitted that the promissory note given by the appellant to the bankrupt was not payable, and could not, in any proceeding or negotiation, be asserted as a credit or offset; that if payable, the same was not of a nature of the obligations referred to or intended by the statute as a "credit or offset," since it was collateral in its inception, and did not arise from the subject matter upon which the mechanics lien was being asserted.

It is further respectfully submitted, that as indicated in Appellant's Opening Brief, a credit allowed upon the promissory note in consideration of the non-assertion and waiver of the right to assert his mechanic's lien by the appellant, constituted a present consideration, which did not result in the diminution of the bankrupt's estate and did not constitute a bankruptcy preference.

Conclusion.

It is respectfully submitted that the contentions contained in Appellant's Opening Brief, are not refuted in the Appellee's Brief, that the transfer of property, the legal ownership (as distinguished from equitable right) of which is not in the bankrupt, does not constitute a bankruptcy preference, and that the payment of the mechanic's lienable claim, does not constitute a preference. That each and both of said situations existed herein, and that by reason thereof, the judgment of the trial court should be reversed, and the cause remanded for further proceedings, in conformity with the law contained in the Appellant's Opening Brief and herein.

Respectfully submitted,

Wolver & Wolver,

By Eugene L. Wolver,

Attorneys for Appellant.